



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-23\*

### FACTS:

You are the Town Clerk of Easthampton. You are also the President of the Massachusetts Town Clerks' Association (MTCA), a voluntary organization of most town clerks in Massachusetts.

The Town Clerk is the principal election official of a town, for both municipal and state elections. After the polls close on election night, election officers count the votes for each precinct and then publicly announce and post the results, G.L. c. 54, §§33H, 35B, 105, all under the Town Clerk's supervision. *Id.* §71A. The Town Clerk is responsible for correcting any errors in, and certifying, the official results, *id.* §111, and (after state primaries and elections) for transmitting the official results in writing to the state Secretary. G.L. c. 53, §52; c. 54, §112. Traditionally, the Town Clerk provides public information about the election results by making copies available and by answering telephone inquiries. Complete official results are not publicly available from the Secretary's office for at least several days after state primaries and elections.

News Election Service (NES) is a cooperative national news agency owned and operated jointly by the Associated Press and the four commercial television networks. NES's sole function is to collect, tabulate, and distribute unofficial election-night vote results in state and national elections. In most of the nation, NES hires a reporter (often a stringer for a local newspaper) for each county election office to phone in the results as they become available on election night. In the New England states, however, election results are tabulated at the municipal, rather than the county, level. Rather than hire 351 reporters for the various Massachusetts city and town election offices, NES has arranged with the MTCA to contribute funds to the Association in return for Clerks' calling NES. Specifically, NES requests each Clerk to call several times: when each precinct's results become available, and when the town's total is complete. NES pays the MTCA at a fixed rate (generally \$4 per call, plus a comparable amount per precinct for the final total call) for each call made by a Clerk on election night. NES requires the election results in a specified format to comply with its computerized system. Both NES and the MTCA write to each Town Clerk before state primaries and elections to request these calls. After each election, NES writes to each Clerk, reporting the number of requested calls made and not made, and reminding the Clerk that NES payments to the MTCA are based on the number of calls made.

The MTCA represents the interests of Massachusetts town clerks. It provides educational resources for them, including holding three annual conferences and publishing a newsletter, and retains a legislative agent. The MTCA's fiscal year 1992 budget is \$34,865, of which NES contributes \$4,600, approximately 13 percent. Clerks' dues amount to \$13,500; some of these dues are paid by individual Clerks, some by their municipalities.

### QUESTION:

May Town Clerks arrange to make telephone calls of election results requested by NES, in return for NES's making payments to the MTCA?

### ANSWER:

No. However, we suggest a method for accomplishing similar results.

### DISCUSSION:

Town Clerks are "municipal employees" under the state conflict of interest law. G.L. c. 268A, §1(g). As such, they are subject to §23(b)(2) of the conflict law, which prohibits current public employees from using their

“official position[s] to secure for [themselves] or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals.”

The Commission has consistently interpreted this provision as prohibiting public employees from obtaining a special advantage of substantial value, not authorized by law or by their official duties, by virtue of their public positions. For example, in *EC-COI-91-13*, we held that the Selectmen’s acceptance of a private donation in order to qualify themselves for town health benefits not authorized by the Town violated §23(b)(2). In *EC-COI-87-7*, we advised a Mayor that he could not accept free travel arrangements offered to him because of his official position, although the giver had no interest in city business. In *EC-COI-86-11*, we held that a judge could not receive an honorarium for attending a seminar on a day when he was also receiving his judicial salary.

Public employees may not seek, in effect, to supplement their official salaries for performing public responsibilities. See *Commission Advisory No. 10 (Chiefs of Police Doing Privately Paid Details)* (1986) (§23[b][2] ordinarily prohibits additional compensation beyond official salary). As we said of the predecessor of §23(b)(2) in our *Advisory No. 8 (Free Passes)* (1985):

Public employees are already compensated for the performance of their duties. To request or accept any item of more than nominal value . . . from private entities which have been, are, or may be subject to the public official’s responsibilities and duties, is to use one’s public position to secure an unwarranted privilege . . . .

It does not matter that the benefit is received by someone other than the public employee, because §23(b)(2) also prohibits securing such unwarranted benefits “for . . . others.” Thus, in *EC-COI-92-12*, we prohibited an unpaid public official from soliciting contributions to various political campaigns from persons within his regulatory jurisdiction. We also found that a state legislator violated the predecessor of §23(b)(2) by using his position to pressure a state agency to make grants to private organizations. *In re Craven*, 1980 SEC 17, 23-24, *aff’d*, 390 Mass. 191 (1983).

Here, the MTCA receives payments from NES because of actions taken by Town Clerks in their official capacities. To the extent that Clerks do not make the calls requested by NES, NES does not make payments to the MTCA. Thus, Clerks are using their unique immediate access to election results to secure unauthorized financial benefits for their private Association.

This financial benefit to the MTCA, which for example amounted to \$4,600 in fiscal year 1992, is clearly “of substantial value” because it exceeds \$50. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)* (1985). Where many public officials are acting in concert (here, through their private Association) to secure the unwarranted privilege, we regard it as appropriate to consider the total value of the benefit to the recipient entity. See *EC-COI-92-2* (aggregating contributions from persons with “common interest”); *EC-COI-91-13* (actual value received, rather than nominal value, determines whether “substantial value”). Therefore, §23(b)(2) prohibits Town Clerks from arranging to make the requested calls to NES in return for NES’s payments to the MTCA.<sup>1/</sup>

Because we recognize the important public interest in prompt information about election results, we emphasize that nothing in G.L. c. 268A prevents Clerks from calling NES or anyone else with immediate election results. The conflict law simply prohibits doing so in return for payments to the Clerks as individuals or to other private parties (including the MTCA).

We also note existing (and apparently unused) statutory authority for the state Secretary to require City and Town Clerks to report immediate (if unofficial) election results by telephone on election night “to such central tabulation facilities as the state secretary shall designate.” G.L. c. 54, §105, third paragraph. The Secretary (with the approval of the Governor and Council) is authorized to adopt rules for the administration of such facilities. *Id.* §110A. See *id.* §37, last paragraph (Secretary is to prescribe regulations governing procedures for “counting, tabulating and recording votes”). You may wish to discuss with the Secretary’s office the use of this authority, conceivably to require election-night reporting to NES in return for authorized payments to the MTCA. Payments explicitly authorized by regulation would, of course, comply with §23(b)(2), because they would not be “unwarranted.”<sup>2/</sup> See, e.g., *EC-COI-92-5*.

## Date Authorized: July 14, 1992

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup>Although we have analyzed this arrangement under §23(b)(2), it may well violate other provisions of G.L. c. 268A, at least in some circumstances.

Thus, if NES's payments to the MTCA allow a Clerk's dues to be reduced by \$50 or more, and the Clerk individually (rather than the Town) pays the dues, NES would "indirectly" give substantial value to that Clerk "for himself," for or because of an act within his official responsibility, in violation of §3. See, e.g., *In re Collector-Treasurer's Office*, 1981 SEC 35 (payments to city officials to "expedite" municipal lien certificates violated §§3, 17).

If NES's promised payments to the MTCA create in the mind of a Town Clerk a "corrupt intent . . . to be influenced in his future performance of an official act," the arrangement would violate §2. See *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976). The required "corrupt" intent is merely that "the bribe be [ ] the prime mover or producer of the official act." *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978); *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974). Unlike §3 (which requires that the recipient be the public employee, at least indirectly), §2 is violated if the payment is made "to any other person or entity." A requested call to NES could well be an "act within [a Town Clerk's] official responsibility." See *Public Enforcement Letter 92-1*, 1991 SEC 548, 559-60.

Finally, Town Clerks who call NES because of promised NES payments to the MTCA may be viewed as acting as NES's agents in relation to the election results, a particular matter in which the Town has a direct and substantial interest, in violation of §17(c). See *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 607-11 (1984) (construing §4[c], the equivalent provision governing state employees); *In re Collector-Treasurer's Office*, 1981 SEC 35.

<sup>2/</sup>Payments authorized by regulation would also comply with the other provisions of G.L. c. 268A mentioned in note 1. They would be "as provided by law for the proper discharge of official duty" under §§3 and 17. See *EC-COI-92-4* (state regulation is "law" for purpose of §4, state equivalent of §17). They would comply with §2 because corrupt intent would necessarily be absent.